BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LUCY J. STERPENIG	)	
Claimant	)	
	)	
VS.	)	
	)	
STATE OF KANSAS	)	
Respondent	)	Docket No. 1,036,297
	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	

ORDER

STATEMENT OF THE CASE

Respondent and the State Self-Insurance Fund (respondent) requested review of the April 30, 2012, Award entered by Administrative Law Judge Rebecca A. Sanders. The Board heard oral argument on August 22, 2012. The Director appointed Jeffrey King to serve as Appeals Board Member Pro Tem in place of former Board Member David A. Shufelt. Cynthia J. Patton, of Topeka, Kansas, appeared for claimant. Bryce D. Benedict, of Topeka, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant failed to file a timely written claim in regard to her alleged date of accident of September 23, 1999, and all benefits for that date of accident were denied. The ALJ further found that the evidence does not support a finding of a repetitive trauma injury for the alleged series ending June 12, 2010, and no benefits were allowed for that claim. Regarding the claim with the date of accident of August 21, 2007, the ALJ found that claimant sustained a 75 percent permanent partial impairment to the left lower extremity at the level of the leg. After deducting 5 percent for a preexisting impairment, the ALJ found claimant had a 70 percent permanent partial impairment to the right lower extremity at the level of the leg.

The Board has considered the record and adopted the stipulations listed in the Award, except the Board notes that stipulation No. 1 incorrectly sets out the two specific dates of accident as September 24, 1999, and August 23, 2007, when the record shows

that claimed dates of accident were September 23, 1999, and August 21, 2007.[1] Claimant also alleged a series of accidents beginning September 23, 1999, and ending on June 12, 2010, her last day worked.[2] Further, stipulation 7 has February 10, 2011, as a date when temporary total disability compensation was begun for the second time, but the correct date was February 10, 2000.[3]

ISSUES

Respondent admits claimant sustained personal injury by accident on September 23, 1999, and that claimant gave timely notice of that accident. However, respondent asks the Board to affirm the ALJ's findings that claimant failed to file a timely written claim for her accident of September 23, 1999, and, in addition, also failed to file a timely Application for Hearing. Although respondent previously argued claimant did not sustain an accidental injury that arose out of and in the course of her employment on August 21, 2007, it now concedes a work-related accident occurred on that date but contends claimant only suffered a temporary exacerbation of her preexisting bilateral knee conditions. Respondent denies that claimant suffered a series of accidents.

Claimant argued in her submission letter that she should be entitled to a 75 percent impairment to each of her lower extremities. In the event the court found claimant did not file a timely written claim or application for hearing for the September 23, 1999, accident, claimant contends this would only result in a 5 percent reduction for a preexisting condition to the 75 percent impairment to her right lower extremity.

The issue for the Board's review are:

(1) What is claimant's date or dates of accident? Specifically, did claimant suffer two single, specific accidents on September 23, 1999, and August 21, 2007, or was there a series of accidents?

(2) Were written claim and an application for hearing timely for the September 23, 1999, accident?

(3) What is the nature and extent of claimant's disability as to each accident and injury?

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[1] Form K-WC E-1, Application for Hearing filed August 28, 2007; Form K-WC E-1, Amended Application for Hearing filed September 20, 2011; R.H. Trans. at 1.

[2] Form K-WC E-1, Amended Application for Hearing filed September 20, 2011, claiming dates of accident of "09/23/1999, series 09/23/1999 until 06/12/2010, 08/21/2007 aggravation."

[3] R.H. Trans. at 7.

(4) Is respondent entitled to a credit for preexisting impairment?

FINDINGS OF FACT

On August 28, 2007, claimant, an employee of respondent who had worked at the Topeka Correctional Facility, filed an Application for Hearing claiming injuries to her bilateral knees on September 23, 1999, and August 21, 2007. On September 20, 2011, claimant filed an Amended Application for Hearing claiming injuries to her bilateral knees on September 23, 1999; in a series beginning September 23, 1999, and ending June 12, 2010, which was her last day worked;[4] and in an aggravation on August 21, 2007.

Claimant was working at the Topeka Correctional Facility as a corrections officer on September 23, 1999, when she slipped on some water that was on the floor. Claimant broke her left ankle and was taken to the emergency room by her supervisor. She was later referred to Dr. Craig Vosburgh. By November 1999, claimant was complaining to Dr. Vosburgh of pain in her right knee. Dr. Vosburgh performed arthroscopic surgery on claimant's right knee. Claimant returned to work in December 1999, and she testified that after working a couple weeks she decided she could not perform her job as a corrections officer. About that time, however, she interviewed for a job with intelligence and investigations (I&I). She was offered the job in I&I by respondent and started her new position in January 2000.

Claimant testified that as an I&I investigator, her job consisted of investigating inmates as well as visitors who would come in from the outside, usually looking for drugs or other contraband. She also monitored the inmates' mail and telephone calls. In the event an incident occurred, she would interview witnesses. When drug dogs were brought in, she would take them to where she was assigned to look for drugs. Claimant said she did a lot of walking with the drug dogs and when she was interviewing witnesses. At times when she walked, she would have to walk up a hill or go up and down stairs.

On August 21, 2007, claimant sustained another injury while working for respondent. She was escorting a man who was leading a drug dog through the different facilities. As she was climbing some stairs, she slipped on the steps and went down. Claimant said she caught herself on the railing before going all the way down to the floor. It is not clear whether her knees actually hit the concrete stairs because there is evidence both that they did and that they did not. The greater weight of the evidence is that she injured her knees by twisting her knees rather than by actually striking them on the concrete stairs. She sat down while the drug dog checked the cell house. She then went back to her office and told her boss about the accident. Claimant said she injured both knees in the accident. Her boss filled out an accident report and two days later claimant was taken to St. Francis Hospital, where she was seen by Dr. Mead and x-rays were taken of her knees. Claimant

[4] Claimant retired from her job at respondent on June 12, 2010. At that time she was 67 years old.

was then referred back to Dr. Vosburgh for treatment. Eventually Dr. Vosburgh performed partial knee replacement surgeries on both of claimant's knees.

Dr. Craig Vosburgh, a board certified orthopedic surgeon, began treating claimant in 1999 after claimant had sustained a left ankle fracture. The treatment for claimant's ankle was conservative or nonoperative. In November 1999, claimant complained that her right knee was painful. Claimant again complained of right knee pain in January 2000, and told Dr. Vosburgh she was uncertain whether the right knee was injured at the time of her fall in September 1999. In January 2000, Dr. Vosburgh gave claimant an injection in her right knee.

On February 14, 2000, Dr. Vosburgh performed a right knee arthroscopy with partial medial meniscectomy, resection of a medial plica semilunaris and chondroplasty of the medial femoral condyle. In his operative note, Dr. Vosburgh noted that claimant had grade II and III chondromalacia of the medial femoral condyle. Dr. Vosburgh's operative note also indicated claimant had a degenerative-type tear of the posterior horn of the medial meniscus. Because Dr. Vosburgh described it as degenerative, he said it probably reflected more of a wear and tear process than just being torn abruptly.

On April 17, 2000, Dr. Vosburgh released claimant to return to her normal duty. On October 10, 2000, Dr. Vosburgh rated claimant as having a 5 percent permanent partial impairment to her right lower extremity based on the AMA *Guides*.[5]

Dr. Vosburgh did not see claimant again until June 2003. At that time, claimant was complaining of bilateral knee pain and said the pain in both knees limited her daily activity. Claimant would have been 60 years old then. X-rays taken at the time showed symmetric mild degenerative changes of each knee. Dr. Vosburgh said those findings indicated claimant had degenerative joint disease, which would not be unusual for a 60-year-old person. Dr. Vosburgh gave claimant an injection of corticosteroid to the left knee. Dr. Vosburgh saw claimant again on July 23, 2003, and claimant said the injection seemed to help both her left and right knees (even though the right knee had not been injected).

Dr. Vosburgh did not see claimant again until September 20, 2007, after her August 2007 injury. At that time, claimant was complaining of pain in both knees, right worse than left. She also complained that her left knee was stiff and seemed to fail her, and she would lose her balance. Claimant told Dr. Vosburgh that her fall in August 2007 had exacerbated her symptoms. X-rays were taken of claimant's knees, and the x-rays showed a progression of claimant's arthritis to a point where claimant had complete joint space loss of the medial compartment of the right knee, and she was bone on bone. Her left knee

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[5] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

condition was not quite as progressed as the right but still had near complete joint space loss. Dr. Vosburgh diagnosed claimant with bilateral medial gonarthrosis.

Claimant underwent right unicompartmental arthroplasty in October 2007 and left unicompartmental arthroplasty on the left in May 2008. Dr. Vosburgh said the incident at work in August 2007 did not cause the loss of joint space interval. Sometime between 2003 and 2007, claimant developed significant arthritis, and arthritis was the reason for the two unicompartmental arthroplasties he performed. Dr. Vosburgh believed the change from 2003 to 2007 was the natural and probable progression of claimant's degenerative joint disease. Dr. Vosburgh further said even if claimant's knees did not hit the ground in her August 2007 accident, one can have a tremendous exacerbation or flare of symptoms from a twisting mechanism of the knee.

Dr. Vosburgh opined that the August 21, 2007, fall aggravated claimant's preexisting bilateral degenerative knee condition and need for surgery.

> Q. [by Claimant's Attorney] In your opinion, to a reasonable degree of medical probability, did the fall aggravate her condition?
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> MR. BENEDICT [Respondent's Attorney] I'm sorry. Object. What fall are you talking about?
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> MS. PATTON [Claimant's Attorney] The fall of August 21, 2007.
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> A. [by Dr. Vosburgh] Oh, I–I don't–I would say by the patient's history and by my description, not by my recollection, her knees were hurting and that the fall seemed to bring this to a more critical level, but that's based on her history and I don't–I have no reason not to believe her history.
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> BY MS. PATTON:
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> Q. Her testimony at the regular hearing was that she was able to walk and jog prior to this fall. Based on that, would you conclude that this fall accelerated her need for knee surgery?
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> A. Based on that, yes. Based on reading my own documentation, I paint a picture here that I was listening to the patient in September and it sounded as though this knee–these knees were an ongoing problem that was now, as I said, reached a bit of a crisis for her.[6]

In regard to claimant's claim of a series of repetitive injuries related to her job duties up to June 12, 2010, Dr. Vosburgh said standing on hard surfaces, if that is the majority of one's job, can exacerbate symptoms related to arthritis and play some role in the progression of it, but it is not the overriding cause of claimant's arthritis.

Dr. Vosburgh said that the AMA *Guides* table for rating total knee replacements would also be appropriate for rating claimant's partial knee replacements.

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[6] Vosburgh Depo. at 32.

Dr. Daniel Zimmerman, a certified independent medical examiner who is board certified in internal medicine, examined claimant on August 16, 2011, at the request of claimant's attorney. Claimant gave a history of her fall in 1999 which resulted in a fractured left ankle as well as injuries to her right and left knees. She also gave Dr. Zimmerman a history of her fall in August 2007. Dr. Zimmerman reviewed the medical records of Dr. Vosburgh resulting from both falls.

At the time of the examination, claimant complained that her right and left knees were constantly painful. She told him she has pain going up and down stairs. She could no longer wear high heels and generally wore tennis shoes. She was only able to walk about 1/2 block before pain in her knees caused her to get off her feet. Claimant said her left knee is more symptomatic than the right knee and that when she walks she hears a clunking sound from within the left knee.

After his examination, Dr. Zimmerman opined that claimant had permanent aggravation of osteoarthritis affecting both the right and left knees. Using the AMA *Guides*, he rated claimant as having a 75 percent permanent partial impairment to each the right and left lower extremity at the level of the leg. He further opined that the accident of August 21, 2007, permanently aggravated the preexisting degenerative changes in claimant's knees. He believed that the accident of August 21, 2007, accelerated claimant's need for a knee replacement.

Dr. Zimmerman said claimant injured both knees in the fall of 1999 when her left ankle was fractured. He said claimant was also injured from repetitive activities in her employment after 1999. Those activities included walking. Dr. Zimmerman did not know how often claimant walked after her job title changed in 2000 but she was not totally sedentary. He stated that in claimant's already damaged knees, it would not take much walking about in carrying out her job duties to cause permanent acceleration and aggravation of the underlying osteoarthritic change.

Dr. Zimmerman recommended claimant restrict her lifting to 20 pounds on an occasional basis and 10 pounds on a frequent basis; that she avoid frequent flexing of the right and left knees and thus avoid frequent bending, stooping, squatting, crawling, kneeling, and twisting activities. Dr. Zimmerman said claimant would be able to walk less than a block before she would need to get off her feet, and she would be able to stand only for 20 to 30 minutes before pain and discomfort in her knees would cause her to have to get off her feet.

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the

claimant's right depends." K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[7] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[8] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[9]

K.S.A. 44-520a(a) states:

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

K.S.A. 44-534 states:

> (a) Whenever the employer, worker, Kansas workers compensation fund or insurance carrier cannot agree upon the worker's right to compensation under the workers compensation act or upon any issue in regard to workers compensation benefits due the injured worker thereunder, the employer, worker, Kansas worker's compensation fund or insurance carrier may apply in writing to the director for a determination of the benefits or compensation due or claimed to be due. The application shall be in the form prescribed by the rules and regulations of the director and shall set forth the substantial and material facts in relation to the claim. Whenever an application is filed under this section, the matter shall be assigned to an administrative law judge. The director shall forthwith mail a certified copy of the application to the adverse party. The administrative law judge shall proceed upon due and reasonable notice to the parties, which shall not be less than 20 days, to

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[7] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[8] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[9] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

hear all evidence in relation thereto and to make findings concerning the amount of compensation, if any due to the worker.

(b) No proceeding for compensation shall be maintained under the workers compensation act unless an application for a hearing is on file in the office of the director within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later.

K.S.A. 44-510d(a) states:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . . .

(16) For the loss of a leg, 200 weeks.

. . . .

(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.S.A. 2007 Supp. 44-501(c) states:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

In *Hanson*, the Kansas Court of Appeals held:

The burden of proving a workers compensation claimant's amount of preexisting impairment as a deduction from total impairment belongs to the

employer and/or its carrier once the claimant has come forward with evidence of aggravation or acceleration of a preexisting condition.[10]

K.S.A. 44-510f states in part:

> (a) Notwithstanding any provision of the workers compensation act to the contrary, the maximum compensation benefits payable by an employer shall not exceed the following:
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> . . . .
>
> (3) subject to the provisions of subsection (a)(4), for permanent or temporary partial disability, including any prior temporary total, permanent total, temporary partial, or permanent partial disability payments paid or due, $100,000 for an injury or any aggravation thereof; and
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> (4) for permanent partial disability, where functional impairment only is awarded, $50,000 for an injury or aggravation thereof.

In *Roberts*,[11] the Kansas Court of Appeals held that "the $100,000 cap in K.S.A. 44-510f(a)(3) applies because it relates to cases in which 'permanent or temporary partial disability, including any prior [TTD benefits are] . . . paid or due.'"

The Kansas Supreme Court, in *Casco,*[12] held:

> Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.

The court in *Casco* further stated:

> K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c. [Citation omitted.]
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> If the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in any type of substantial and gainful

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[10] *Hanson v. Logan U.S.D. 326,* 28 Kan. App. 2d 92, Syl. ¶ 5, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001)

[11] *Roberts v. Midwest Mineral, Inc.*, 41 Kan. App. 2d 603, 611, 204 P.3d 1177 (2009), *rev. denied* 290 Kan. 1095 (2010).

[12] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶ 7, 154 P.3d 494 (2007).

> employment, the claimant's award must be calculated as a permanent partial disability. [Citations omitted.][13]

ANALYSIS

Having considered the entire record, the Board agrees with the findings of fact and conclusions of law of the ALJ and adopts those findings and conclusions as set forth in the ALJ's Award except as to the calculation of the permanent partial disability awarded, which will be explained below. As to dates of accidents, the Board concurs that the evidence fails to prove a series of repetitive traumas. Rather, the greater weight of the evidence is that claimant was injured in two specific traumatic accidents, the first occurring on September 23, 1999, and the second on August 21, 2007. Both accidents arose out of and in the course of claimant's employment with respondent.

Claimant's claim for compensation for the September 23, 1999, accident is time barred. Although it seems unlikely, given that respondent paid for temporary total disability and medical treatment benefits, that there would be no timely writing presented to respondent by claimant that would constitute a written claim, nevertheless that is what the record shows. Claimant received 17 weeks of temporary total disability compensation for the period of September 24, 1999, to December 20, 1999, and February 10, 2000, to March 11, 2000. She received authorized medical treatment through April 17, 2000, when she was released by Dr. Vosburgh. No written claim for compensation was made, and no application for hearing was filed until August 28, 2007. This was more than the 200 days after the date of the last payment of compensation required by K.S.A. 44-520a(a), even if the last date of compensation is extended to include claimant's return to see Dr. Vosburgh in June and July 2003.[14] Likewise, the August 28, 2007, filing of claimant's Application for Hearing was more than three years after the date of accident and more than two years after the date of the last payment of compensation as required by K.S.A. 44-534.

Because claimant suffered simultaneous injuries to her bilateral knees in the accident of August 21, 2007, there is a rebuttable presumption that claimant is permanently, totally disabled as a result of those injuries. That presumption is rebutted, however, by the fact that claimant was able to return to work following her release from medical treatment for those injuries. The Board otherwise agrees with the ALJ that claimant's percentage of functional impairment resulting from the August 21, 2007, accident is 75 percent to the left leg and 75 percent to the right leg. Respondent is entitled to a credit pursuant to K.S.A. 2007 Supp. 44-501(c) for the 5 percent impairment to the right leg that preexisted claimant's August 21, 2007, accident.

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[13] *Id*. at 528

[14] Respondent made an offer of settlement to claimant by letter dated October 19, 2000, but there is no evidence that claimant ever responded in writing to that offer. Hodges Depo., Ex. 5.

Finally, because the record shows that claimant was paid 12.71 weeks of temporary total disability compensation for the left leg injury for the period of May 13, 2008, through August 9, 2008, permanent partial disability compensation is limited to $100,000 by K.S.A. 44-510f(a)(3). But the record fails to show that claimant was paid temporary total disability compensation for the right leg injury, even though she had surgery on the right knee in October 2007. As such, her permanent partial disability compensation is limited to $50,000 under K.S.A. 44-510f(a)(4).

CONCLUSION

(1) Claimant suffered personal injury by accident arising out of and in the course of her employment on September 23, 1999, and August 21, 2007.

(2) The claim for workers compensation benefits for the September 23, 1999, accident is barred for failure to serve timely written claim and failure to file a timely application for hearing.

(3) As a result of the August 21, 2007, accident, claimant has a 75 percent permanent impairment of function to her right leg (scheduled injury) and a 75 percent permanent impairment of function to her left leg (scheduled injury).

(4) Respondent is entitled to a credit for the 5 percent preexisting impairment to claimant's right leg.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated April 30, 2012, is modified to apply the $50,000 cap to claimant's disability award for her right leg but is otherwise affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2012.

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BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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